Supreme Court, U.S.
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89-275

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOTER & GELL,

Petitioner,

v.

HARTMARX CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether jurisdiction exists to impose Rule 11 sanctions following a plaintiff's voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(i).

2. What is the standard to be applied when deciding the reasonableness of a plaintiff's prefiling inquiry in an antitrust case.

3. Whether review of Rule 11 sanctions under an "abuse of discretion" standard is appropriate.

4. Whether the District Court abused its discretion in imposing Rule 11 sanctions on Cooter & Gell.

5. Whether the amount of the sanctions awarded was so excessive as to constitute an abuse of discretion.

6. Whether a Court of Appeals can automatically impose Rule 11 sanctions for an appeal upon affirmance of a Rule 11 award.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption to the Petition, Danik, Inc. was a Plaintiff in the District Court. The Court of Appeals dismissed Danik's appeal for failure to prosecute. Danik is now bankrupt.

Respondents include Hart, Schaffner & Marx and Hickey-Freeman Co., Inc., wholly-owned corporate subsidiaries of Hartmarx Corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
I. There Is A Split Of Authority Over Whether A District Court May Impose Rule 11 Sanctions Following A Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(i)	8
II. There Is A Split Of Authority Over The Standard Of Reasonableness Applied To A Plaintiff's Pre-Filing Inquiry In An Antitrust Case	12
III. There Is A Split Of Authority Over The Standard To Be Used In Reviewing Rule 11 Sanctions	16
IV. There Is A Split Of Authority Over The Automatic Imposition Of Rule 11 Sanctions For An Appeal	18
CONCLUSION	20
APPENDIX	1a
May 19, 1989, opinion of the United States Court of Appeals for the District of Columbia Circuit	1a

TABLE OF CONTENTS—Continued

	Page
February 26, 1988, opinion of the United States District Court for the District of Columbia	18a
February 26, 1988, order of the United States District Court for the District of Columbia for award of sanctions	31a
December 2, 1988, order of the United States District Court for the District of Columbia, inviting Defendants to submit statement of costs and attorneys fees	32a

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)	7
Basch v. Westinghouse Electric Corp., 777 F.2d 165 (4th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986)	19
Carter v. United States, 547 F.2d 258 (5th Cir. 1977)	9
Community Electric Service of Los Angeles, Inc. v. National Electrical Contractors Association, Inc., et al., 869 F.2d 1235 (9th Cir. 1989)	13
Cuddy v. Carmen, 762 F.2d 119 (D.C. Cir.), *cert. denied*, 474 U.S. 1034 (1985), *reh'g denied*, 475 U.S. 1072 (1986)	18
D.C. Electronics, Inc. v. Nartron Corp., 511 F.2d 294 (6th Cir. 1975)	10
D & M Orthotics and Prosthetics, Inc. v. Sisters of Mercy Health Corporation, No. 88-1945, slip op. (6th Cir. June 5, 1989) (Westlaw, CTA6 Database)	13, 14
Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 104 S. Ct. 831, 78 L.Ed.2d 645 (1984)	7
Danik, Inc. v. Hartmarx, et al., 120 F.R.D. 439 (D.D.C. 1988)	1, *passim*
Danik, Inc. v. Hartmarx, et al., 875 F.2d 890 (D.C. Cir. 1989)	1, *passim*
Eastway Construction Corp. v. City of New York, 637 F.Supp. 558 (E.D.N.Y. 1986), *modified and remanded on other grounds*, 821 F.2d 121 (2d Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 269 (1987)	5, 19
Greenberg v. Sala, 822 F.2d 882 (9th Cir. 1987)	10
Hanna v. Plumer, 380 U.S. 460, 85 S. Ct. 1136, 14 L.Ed.2d 8 (1965)	7
Hays v. Sony Corp. of America, 847 F.2d 412 (7th Cir. 1988)	18
Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 42, 91 L.Ed.2d 451 (1946)	7

TABLE OF AUTHORITIES—Continued

	Page
In re matter of Yagman, 796 F.2d 1165 (9th Cir.), *reh'g denied and opinion amended*, 803 F.2d 1085 (9th Cir. 1986)	13
Int'l Union v. National Right To Work Legal Defense Foundation, Inc., 781 F.2d 928 (D.C. Cir. 1986)	18
Johnson Chemical Co., Inc. v. Home Care Products, Inc., 823 F.2d 28 (2d Cir. 1987)	8, 9, 11
Kurkowski v. Volcker, 819 F.2d 201 (8th Cir. 1987)	10, 17
Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600 (1st Cir. 1988)	10
Orange Production Credit Assoc. v. Frontline Ventures, Ltd., 801 F.2d 1581 (9th Cir. 1986)	19
Santiago v. Victim Services Agency, 753 F.2d 219 (2d Cir. 1985)	8, 9
Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L.Ed.2d 18 (1986)	7
Schlagenhauf v. Holder, 379 U.S. 104, 85 S. Ct. 234, 13 L.Ed.2d 152 (1964)	7
Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053, 22 L.Ed.2d 319 (1969)	7
State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 87 S. Ct. 1199, 18 L.Ed.2d 270 (1967)	7
Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987)	8, 9, 10, 11
United States v. Columbia Broadcasting System, Inc., 666 F.2d 364 (9th Cir.), *cert. denied*, 457 U.S. 1118 (1982)	17
Westmoreland v. CBS, 770 F.2d 1168 (D.C. Cir. 1985)	14, 16, 17, 19
White v. N.H. Department of Employment Security, 455 U.S. 445, 102 S. Ct. 1162, 71 L.Ed.2d 325 (1982)	7
Williams v. Ezell, 531 F.2d 1261 (5th Cir. 1976)	9
Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986)	17

TABLE OF AUTHORITIES—Continued

Statutes and Rules:	Page
Clayton Antitrust Act, 15 U.S.C. § 12	4
Robinson-Patman Act, 15 U.S.C. § 13	3
Sherman Antitrust Act, 15 U.S.C. §§ 1, 2	4, 13
Fed. R. Civ. P. 11	2, *passim*
Fed. R. Civ. P. 41	2, *passim*
Fed. R. App. P. 38	7, 19
Law Reviews:	
Joseph, *The Trouble with Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87 (1987)	6
Note, *Plausible Pleading: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630 (1987)	6
Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988)	6
Nelken, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988)	5, 6
Vairo, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313 (1986)	5, 13
Miscellaneous:	
5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* (2d ed. 1982)	10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Cooter & Gell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. *infra*, 1a-17a) is reported at 875 F.2d 890 (D.C. Cir. 1989). The ruling of the United States District Court for the District of Columbia granting sanctions (App. *infra*, 18a-31a) is reported at 120 F.R.D. 439 (D.D.C. 1988).

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondent Hartmarx Corp., et al., filed for sanctions against Petitioner Cooter & Gell pursuant to Fed. R. Civ. P. 11 which provides in relevant part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably incurred because of the filing of the pleading, motion, or other paper including a reasonable attorney's fee.

Prior to a ruling on that Motion, Danik, Inc. voluntarily dismissed pursuant to Fed. R. Civ. P. 41(a)(1)(i) which provides:

> [A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . .

STATEMENT OF THE CASE

Petitioner Cooter & Gell is a partnership engaged in the practice of law in the District of Columbia. In 1983, Danik, which is currently bankrupt, was engaged in the "discount" or "off-price" retail sale of men's clothing in the District of Columbia area under the trade-name "Dash's Designer." Danik was a family business whose

principals were John Dashtara, his brother, Dar Dash, and Dar's wife. Respondent Hartmarx is a Chicago-based national manufacturer and retailer of high quality men's clothing. Hart, Schaffner & Marx and Hickey-Freeman Co. are wholly-owned corporate subsidiaries of Hartmarx (hereinafter collectively referred to as the Hartmarx group).

Litigation between Danik and Hartmarx began in June, 1983 when Intercontinental Apparel, Inc., another wholly-owned subsidiary of Hartmarx Corporation, brought an action against Danik in the United States District Court for the District of Columbia seeking damages on an account. Danik filed a counterclaim alleging price discrimination violations under the Robinson-Patman Act, 15 U.S.C. § 13. In March 1984, the District Court (The Honorable Oliver Gasch) granted summary judgment in favor of Intercontinental on the claim and the United States Court of Appeals for the District of Columbia Circuit affirmed. In February 1985, a jury returned a verdict for Intercontinental on the antitrust counterclaim which the D.C. Circuit also affirmed.

While the above-described litigation was in its early stages, Cooter & Gell became familiar with Danik's business in the men's clothing industry. Danik's principals informed Cooter & Gell that in an effort to preserve artificially high prices for Hartmarx's lines of better men's suits, Hartmarx Corp., Hickey-Freeman Co. and Hart, Schaffner & Marx maintained a policy of exclusive dealing throughout the major metropolitan areas of the United States.

Based upon this information, Cooter & Gell began its own inquiry to determine if a reasonable basis existed for the client's factual claims. A Cooter & Gell attorney and secretary called retailers in Washington, D.C., Baltimore, Philadelphia and New York City to investigate the information it had received from its client that Hartmarx did not sell to more than one retailer in each city. All

the inquiries confirmed the client's charges that Hartmarx did sell to only one retailer in each city. In light of this inquiry, Cooter & Gell believed that it could rely upon its client's factual descriptions of the nationwide practices by Hartmarx in the men's clothing industry.

Cooter & Gell drafted an initial version of the complaint at issue here and presented it to counsel for Hartmarx, the same attorneys opposing Danik in the Intercontinental Suit. Later, the final version of the Hartmarx Complaint was also provided to counsel for Hartmarx before filing. Although the Hartmarx attorneys may have regarded the Hartmarx Complaint as factually spurious from the moment they saw its earlier draft, they never revealed their disagreement with the factual underpinning of the complaint to Cooter & Gell.

Hearing nothing from Hartmarx in response to the draft complaint, in November 1983, Cooter & Gell filed the antitrust complaint at issue here. The Complaint alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 12, based on the exclusive retailer agency policy of the Hartmarx group. In response, Hartmarx filed a motion to dismiss and a motion for sanctions pursuant to Rule 11, claiming that Cooter & Gell had not made sufficient prefiling inquiries.

In late 1983, therefore, Danik had two antitrust actions pending in the district court against Hartmarx Corporation and its subsidiaries. For economic reasons, Danik agreed, upon advice of counsel, to voluntarily dismiss the instant suit. In April 1984, Danik filed a notice of voluntary dismissal without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(i).

In June 1984, counsel argued the motion for sanctions, and the court took the matter under advisement. Nearly four years later, in early 1988, the District Court invited Hartmarx to submit its statement of fees and

expenses for consideration. (App. *infra*, 32a).[1] In February 1988, the District Court granted Hartmarx's motion for sanctions. The court awarded Hartmarx over $30,000, two-thirds to be paid by Cooter & Gell and one-third to be paid by Danik.

Cooter & Gell appealed the imposition of sanctions. The appeal was based on the claim that the District Court lost jurisdiction over the motion when the case was voluntarily dismissed. Cooter & Gell further argued that even if the court retained jurisdiction, the sanctions were improperly imposed because the prefiling inquiry conducted was objectively reasonable. Cooter & Gell also claimed the award was excessive. The Court of Appeals rejected Cooter & Gell's arguments, upheld the District Court decision, and additionally ordered Cooter & Gell to pay Hartmarx's attorney's fees for the appeal.

REASONS FOR GRANTING THE PETITION

Rule 11 of the Federal Rules of Civil Procedure, as amended in 1983, has been both vigorously and unevenly applied, leaving the federal judiciary and bar in an "Era of Sanctions," but lacking an integrated code to supply coherent guidance. *See Eastway Construction Corp. v. City of New York*, 821 F.2d 121 (2d Cir. 1987) (Pratt, J. dissenting) (noting "apparent disparities, even capriciousness, [now seem] to characterize much of Rule 11 jurisprudence"), *cert. denied*, —— U.S. ——, 108 S. Ct. 269 (1987). As a result, Rule 11 has become the cottage industry of the litigation bar. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988).[2] As one commentator has stated:

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[1] Ironically, the District Court's invitation came on the heels of another, completely unrelated trial in which Cooter & Gell represented one of the parties. *See Kuwait Airways Corp. v. First American Bank, N.A., et al.*, No. 88-7039.

[2] Along with the escalation in Rule 11 litigation, there has been an "explosion" of Rule 11 literature. Much of it is highly critical of Rule 11. *See Vairo*, 118 F.R.D. at 200 n.59 (citing Nelken, *Sanc-*

> Whether Rule 11 is upgrading the quality of civil litigation practice is debatable. That it is adding to the quantity is not. More than 1,000 Rule 11 decisions have been rendered since August 1983. The rule generates its own momentum: Lawyers move for sanctions; judges invite lawyers to move for sanctions; lawyers move for sanctions against lawyers whose offense is a prior motion for sanctions.
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> [I]t is apparent that not all judges agree, in philosophy or in practice, on precisely what conduct constitutes a violation of the rule. *Practicing under Rule 11 is like negotiating a minefield. You know there will be an explosion if you step on a mine. The trouble is, you don't know where the mines are.*

Joseph, *The Trouble with Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87, 88-9 (1987) (emphasis added).

Judge Schwarzer, of the Northern District of California, writes that the application of Rule 11 is confused and that the courts' standards are unpredictable. Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988). In Judge Schwarzer's view, this raises an issue of fairness, because "[s]anctions may have penal consequences, including injury to a lawyer's reputation, investigation by state bar associations, and adverse effects on malpractice insurance coverage." *Id.*[3]

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tions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313 (1986); Note, *Plausible Pleading: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630 (1987)); *see also*, Note, *A Uniform Approach to Rule 11 Sanctions*, 97 Yale L.J. 901 (1988); Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013 (1988); Joseph, *The Trouble with Rule 11—Uncertain Standards and Mandatory Sanctions*, 73:8 A.B.A. J. 87 (1987).

[3] Judge Schwarzer is not exaggerating the consequences of the Rule 11 sanction. As a result of the recent publication of the D.C. Circuit's opinion in *Danik*, an investigation into this matter has been initiated by the D.C. bar. In addition, opposing counsel in other cases have used the sanction award as a threat to various members of the law firm, including bringing it to the attention of the court in a pleading in at least one other unrelated case.

Not surprisingly, the Federal Courts of Appeals are split over several key issues in this case. Direct conflict between the circuits exists on the issue of whether a trial court retains jurisdiction to impose Rule 11 sanctions following a Rule 41 notice of voluntary dismissal. The courts are also not in agreement as to the standard to be used in determining the reasonableness of the plaintiff's prefiling inquiry in an antitrust case. Further, there is conflict as to whether an "abuse of discretion standard" is appropriate for the review of Rule 11 sanctions. Lastly, there is conflict over the interrelation between Fed. R. Civ. P. 11 and Fed. R. App. P. 38: the courts are split as to whether a party is automatically entitled to sanctions for the appeal when the appellate court affirms the lower court's imposition of sanctions. These issues, involving uniform enforcement of the Federal Rules of Civil Procedure, and the standard of conduct expected of the federal bar, are particularly suited to review by this Court. *See generally Hickman v. Taylor*, 329 U.S. 495 (1946); *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).[4] It

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[4] *See also Schiavone v. Fortune*, 477 U.S. 21 (1986) (certiorari was granted because of an apparent conflict among the Courts of Appeals regarding Fed. R. Civ. P. 15(c)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (granted certiorari to resolve conflict concerning standard to be applied under Fed. R. Civ. P. 56); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984) (certiorari was granted to resolve a conflict regarding demand requirement of Fed. R. Civ. P. 23.1); *White v. N.H. Department of Employment Security*, 455 U.S. 445 (1982) (certiorari was granted to resolve the timeliness standard set forth in Fed. R. Civ. P 59(e)); *Snyder v. Harris*, 394 U.S. 332 (1969) (certiorari was granted to resolve the conflict of whether Rule 23 allows separate claims to be aggregated to meet the $10,000 jurisdictional minimum); *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967) (certiorari was granted because the case involved "a matter of significance to the administration of federal interpleader").

is respectfully submitted that the uncertainty facing other litigants, and the legal profession itself, caused by the lack of uniformity on these fundamental issues mandates further review of and a definitive answer on these issues by this Court.

I. There Is A Split Of Authority Over Whether A District Court May Impose Rule 11 Sanctions Following A Voluntary Dismissal Pursuant To Fed. R. Civ. P. 41(a)(1)(i)

In its opinion, the D.C. Circuit held that a Rule 41(a) notice dismissal did not deprive the District Court of jurisdiction to impose Rule 11 sanctions. This holding is in accord with similar holdings in the First, Seventh, Eighth and Ninth Circuits, and in direct conflict with holdings in the Second and Fifth Circuits. Relying on the Second Circuit decisions in *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d 28 (2d Cir. 1987), and *Santiago v. Victim Services Agency*, 753 F.2d 219 (2d Cir. 1985), Cooter & Gell argued that once it filed a Rule 41(a) dismissal, the District Court was deprived of jurisdiction to impose Rule 11 sanctions. In rejecting Cooter & Gell's argument on appeal, the Court of Appeals relied on the decision of the Seventh Circuit in *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987), which explicitly rejected *Santiago* and allowed post-dismissal sanctions.

In reversing a post-dismissal award of attorney's fees, the Second Circuit has stated flatly that, "[o]nce the plaintiff has dismissed the action . . . the Court loses all jurisdiction over the action." *Santiago*, 753 F.2d at 221. More recently, the Second Circuit directly addressed the specific issue of Rule 11 sanctions following a voluntary dismissal. In *Johnson Chemical Co., Inc. v. Home Care Products, Inc.*, 823 F.2d at 30, the District Court had granted the defendant's motion to vacate the plaintiff's voluntary dismissal and sanctioned the plaintiff under Rule 11. Reversing the trial court, the Second Circuit

held that the plaintiff has the "unfettered power" to file a notice of dismissal before an answer or motion for summary judgment has been filed. *Id.* (citing *Santiago*, 753 F.2d at 221). The reviewing court concluded that since the plaintiff was plainly entitled to a voluntary dismissal, the District Court lost all jurisdiction after the plaintiffs voluntarily dismissed, and therefore, Rule 11 sanctions could not be imposed. *Id.* at 31.

The Fifth Circuit has reached a similar conclusion on this issue. That court has consistently held that Rule 41(a)(1)(i) means just what it says. *Williams v. Ezell*, 531 F.2d 1261 (5th Cir. 1976) (where defendants filed neither an answer nor a motion for summary judgment prior to plaintiffs' notice of voluntary dismissal, district court had no power or discretion to deny plaintiffs' right to dismiss or to assess attorney's fees against them); *Carter v. United States*, 547 F.2d 258 (5th Cir. 1977) (defendants' motion to dismiss on the merits is not the equivalent of an answer and does not prevent plaintiffs from invoking unfettered right to voluntary dismissal). The district court has no power to deny the absolute right of a plaintiff to a voluntary dismissal. *Williams*, 531 F.2d at 1264. Further, filing a notice of dismissal automatically ends the case and "except for determining appealability, the subsequent orders . . . [of the district court are] a nullity." *Id.*

The Seventh Circuit, however, has held to the contrary in *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987). The court directly rejected the reasoning of *Santiago*'s holding that the district court lacks jurisdiction "to do anything at all" after voluntary dismissal. The *Szabo* court found that a court may lack "jurisdiction" to do some things but not others, and one of the things "jurisdiction" was retained over was post-dismissal imposition of Rule 11 sanctions. *Id.* at 1077-79.

The First and Ninth Circuits have followed the *Szabo* decision, both holding that voluntary dismissal does not deprive the court of jurisdiction to consider a motion for sanctions pursuant to Rule 11. *Greenberg v. Sala*, 822 F.2d 882 (9th Cir. 1987); *Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988).[5]

Apart from the unique timing question presented by this case—where the court below retained "jurisdiction" for almost *four years* after dismissal—there are several reasons to prefer the Second Circuit's holdings in *Santiago* and *Johnson* to that of *Szabo* and its progeny. First, there is the fact that Rules 11 and 41 simply admit to no exception to the "bright line" of the plaintiff's unfettered power to dismiss voluntarily and with finality pursuant to Rule 41(a)(1)(i). *Johnson*, 823 F.2d at 30. If the drafters had wished to propose such an exception, they could have done so, and it is up to neither a district court to assume, nor a reviewing court to create, authority withheld by the Rules.

Second, permitting even this encroachment upon the letter of Rule 41 is to disapprove the many and varied cases interpreting its provisions strictly. *See* 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.02 [2] and [3] (2d ed. 1982) and cases collected therein. Many have tried and failed to chip away at the rule's straightforward language without success for. as noted by the Sixth Circuit, "although Rule 41 has been amended three times since 1948, it has not been broadened to include other motions or pleadings which would bar a dismissal by notice." *D.C. Electronics, Inc. v. Martron Corp.*, 511 F.2d 294, 296 (6th Cir. 1975). This consideration—that many years of entirely consistent decisions affirming the unfettered power of a plaintiff to voluntary dismissal would be swept aside by carving an exception

[5] The Eighth Circuit independently reached a similar result in *Kurkowski v. Volcker*, 819 F.2d 201 (8th Cir. 1987).

for Rule 11 proceedings—was not addressed by *Szabo* or its progeny. This is no small concern; rejection of the accumulated jurisprudence surrounding Rule 41 is to invite other defendants to foray into the Courts of Appeals seeking decisions which would further transform that which has heretofore been a settled and immutable rule. The *Johnson* opinion preserves these precedents and the value of their guidance to litigants, while *Szabo* questions them even without discussion.

This indirect and perhaps unintended consequence not only is inconsistent with better jurisprudence but also potentially conflicts with a stated purpose of Rule 11 itself—to increase the efficiency of the judicial system. *See* Fed. R. Civ. P. 11 advisory committee notes, 97 F.R.D. 165, 198. That is, the affirmance by the D.C. Circuit following *Szabo* to increase the reach of Rule 11 will lead to a certain volume of satellite litigation over many other newly-asserted exceptions to the bar of a Rule 41 notice of dismissal. It is respectfully submitted that the potential for accomplishing good in post-dismissal Rule 11 proceedings is far outweighed by the certain harm, measured simply in terms of the multiplicity of assaults on Rule 41, which will surely result from the means to those ends. Thus, the *Johnson* decision not only preserves the integrity of the Rule 41 decisions but also serves one of the purposes of Rule 11.

It is critical that this Court resolve the conflict regarding imposition of Rule 11 sanctions following a Rule 41 notice of voluntary dismissal. Clearly, the existing situation is confusing to litigants. A litigant in a jurisdiction that has not addressed this issue cannot be certain what impact a voluntary dismissal will have on the case. Voluntary dismissal may terminate a case completely or may merely "stop the running of attorneys' fees." *See Szabo*, 823 F.2d at 1079. A litigant will simply have to dismiss and then wait to see how the issue is decided in that jurisdiction. This uncertainty can only impair an attor-

ney's ability to effectively and competently conduct a lawsuit, and may in fact encourage protracted litigation in the hopes that a plaintiff's theory will eventually be supported by the facts, instead of encouraging voluntary dismissals.

Furthermore, the split leads to unequal treatment of litigants. Individuals acting under the same federal rule do not receive the same treatment simply by virtue of the jurisdiction in which they bring suit. Litigants in the Second and Fifth Circuits can dismiss a case voluntarily and be assured that the entire matter is resolved. Litigants in the District of Columbia, First, Seventh, Eighth and Ninth Circuits, however, will be left hanging following a voluntary dismissal. Indeed, the filing of a voluntary dismissal may actually prompt the imposition of Rule 11 sanctions: a party may voluntarily dismiss, intending to terminate the case completely, only to find themselves faced with sanctions months, or as here—even years—after the dismissal. One of the primary reasons for having a single set of Federal Rules is to ensure that litigants in all jurisdictions are treated consistently. The split on this issue, however, results in disparate treatment. To assure equal treatment under the Federal Rules of Civil Procedure, and to give guidance to future litigants and the bar, it is respectfully submitted that this Court resolve this very fundamental split in the circuits regarding Rule 11 and Rule 41(a)(1)(i).

II. There Is A Split Of Authority Over The Standard Of Reasonableness Applied To A Plaintiff's Pre-Filing Inquiry In An Antitrust Case

In reaching its decision to affirm the award of Rule 11 sanctions, the D. C. Circuit failed to give any weight to the fact that this was an antitrust action. The Ninth and Sixth Circuits, however, have recently found that the standard of reasonableness of the prefiling inquiry in an antitrust action should be less demanding than that re-

quired in other cases. *See Comunity Electric Service Of Los Angeles, Inc. v. National Electrical Contractors Assoc., Inc.*, 869 F.2d 1235 (9th Cir. 1989); *D & M Orthotics & Prosthetics, Inc. v. Sisters of Mercy Health Corporation*, No. 88-1945, slip op. (6th Cir. June 5, 1989) (unpublished disposition—available on Westlaw).

The Ninth Circuit has held that in imposing sanctions, each case must be evaluated individually "in light of its own peculiar circumstances." *In re matter of Yagman*, 796 F.2d 1165, 1182 (9th Cir.), *reh'g denied and opinion amended*, 803 F.2d 1085 (9th Cir. 1986). The circumstances of an antitrust case are such that the defendants are usually in control of the proof necessary to establish plaintiff's case. *Community Electric*, 869 F.2d at 1246. Because of disparate access to information, it follows that a less demanding standard should be used in evaluating the prefiling inquiry in an antitrust action. This is precisely what the Ninth Circuit has held in *Community Electric*, 869 F.2d 1235. Focusing on the plaintiff's antitrust claims, the court said, "we grant summary judgment less frequently in the antitrust context, in part because the alleged conspirators control the proof. . . . *This less demanding standard should also apply under Rule 11 to evaluate the associated documents.*" *Community Electric*, 869 F.2d at 1246 (citations omitted) (emphasis added).[6]

In *D & M Orthotics*, the plaintiffs filed a complaint alleging violations of Sections 1 and 2 of the Sherman Act. Defendants moved for sanctions on the grounds that the prefiling inquiries were inadequate. Prior to filing the case, plaintiff learned from a competitor and some of

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[6] The fear of many critics that Rule 11 would become part of every defendant's litigation bag was not ill-founded. The reported cases confirm that Rule 11 is being used disproportionately against plaintiffs, especially in certain types of litigation, including, as here, antitrust cases brought by small companies. Vairo, *supra*, 118 F.R.D. at 200.

its own patients that the defendants were "out to destroy" the plaintiff. The court refused to impose sanctions, holding that this circumstantial evidence of a violation was a sufficient basis for the antitrust claims. *D & M Orthotics*, Westlaw p. 3. The district court held that once the complaint based on circumstantial evidence was filed, the facts necessary to prove the claim, including the market power of the defendants, could be developed through discovery. *Id.* at 4. The Sixth Circuit agreed, affirming the district court's denial of sanctions. *Id.*

As is clear from the opinion in this case, the D. C. Circuit ignored the difficult issues of proof confronting an antitrust plaintiff. *See Danik, Inc., et al. v. Hartmarx Corp., et al.*, 875 F.2d 890 (D.C. Cir. 1989). Although the D.C. Circuit acknowledged that disparate access to information is relevant to the imposition of sanctions, *id.* at 896, this factor simply was not taken into consideration when the District Court imposed sanctions, nor in the affirmance of those sanctions. Relying upon *Westmoreland v. CBS, Inc.*, 770 F.2d 1168 (D.C. Cir. 1985), the Court of Appeals apparently imposed the same standard of reasonableness used in all Rule 11 actions. If the Court of Appeals had followed the less demanding approach of the Sixth and Ninth Circuits, rather than the strict dictates of *Westmoreland* (which arose in a totally different factual situation), it surely would have found Cooter & Gell's prefiling inquiry reasonable under the circumstances here, where the proof was controlled by the defendants.

Even if the less demanding standard is not applied however, the District Court and Court of Appeals erred in finding that the prefiling inquiry of Cooter & Gell did not satisfy Rule 11. As set forth above in the *Statement of the Case*, Cooter & Gell conducted an inquiry by telephone to confirm its client's claims that to preserve artificially high prices for its lines of better men's suits,

Hartmarx maintained a policy of exclusive dealing throughout the major metropolitan areas of the United States. The complaint was filed only after the client's initial allegations were supported by the information received in the telephone inquiry of the major east-coast markets. Cooter & Gell's own inquiry, coupled with the information from the client, clearly provided adequate support for the complaint to be filed.[7]

The confusion surrounding the standard to be applied to the reasonableness of the prefiling inquiry by an antitrust plaintiff must be settled with finality to ensure continued uniform enforcement of Federal antitrust laws. In recent years, private attorneys general have played a key role in the enforcement of the antitrust laws. If this issue is not resolved, the enforcement of these laws by private individuals will be sporadic, at best, and may all but cease. Because individuals will fear the imposition of sanctions for inadequate prefiling inquiries although they have acquired as much information as possible without the help of discovery, they will be hesitant to bring suit. Unless a violation is so flagrant that it can be proved without the help of discovery, plaintiffs will not file suit.

Not only will enforcement of antitrust actions be curtailed, the enforcement that does occur will be grossly unfair. In jurisdictions where plaintiffs are held to a less demanding standard of prefiling inquiry, enforcement will be vigorous. Plaintiffs will bring suit even though the antitrust nature of the case prevents them from obtaining conclusive proof of a violation prior to filing the complaint. In those jurisdictions imposing a more stringent standard, however, there will be virtually no enforcement because the burden on and risk to the

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[7] The erroneous finding of a Rule 11 violation was then compounded by the awarding of $32,103.78 in sanctions, an amount which was more than half of a legal fee that the District Court itself found "excessive." (*See* App. *infra*, 28a-30a).

individuals—the private attorneys general—is too great. Simply by virtue of the jurisdiction in which they are located, some companies will be almost immune from private enforcement of the antitrust laws. To ensure widespread, equitable and continued enforcement of federal antitrust laws, a single standard needs to be established.

III. There Is A Split Of Authority Over The Standard To Be Used In Reviewing Rule 11 Sanctions

The Memorandum of the District Court embodied several distinct and separately reviewable decisions. First, the court implicitly decided that it not only had the authority to decide the Rule 11 Motion notwithstanding Danik's Rule 41 dismissal, but also that it could retain jurisdiction over that motion for almost four years after the case was voluntarily dismissed. Apart from the question of the District Court's authority to proceed, the decision on the merits was comprised of three separately reviewable rulings. First, the court reached conclusions regarding certain facts. Second, the court applied the law to those facts to determine whether a violation of Rule 11 had occurred. Finally, the court exercised its discretion to decide upon the amount of the award and its division between attorneys and client. In 1985, the D.C. Circuit, in *Westmoreland v. CBS., Inc.*, 770 F.2d 1168, adopted a statement of the standards of review applicable to Rule 11 appeals. The *Westmoreland* opinion, which concerned a discovery matter, held that the district court is accorded wide discretion in determining whether factual or bad faith reasons exist which may give rise to sanctions under Rule 11 because "the district court has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Id.* at 1174. Accordingly, a district court will be reversed if the Court of Appeals finds that it abused its discretion in finding the facts and/or applying the law of Rule 11 decisions to those facts. If the decision below concerns only the legal sufficiency of a pleading or motion, rather

than an inquiry into underlying facts, the question receives *de novo* review. *Id.* at 1175. In addition, when determining whether sanctions should have been imposed at all, the Court of Appeals ". . . must [also] consider whether the [district court's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quoting *United States v. Columbia Broadcasting System, Inc.*, 666 F.2d 364, 371 (9th Cir.), *cert. denied*, 457 U.S. 1118 (1982)). Once the district court determines that a violation has occurred, the selection of an appropriate sanction is committed to its discretion. *Westmoreland*, 770 F.2d at 1174. Thus, under *Westmoreland*, the factual findings of the Court, application of the law to those facts and both the amount and division of sanctions are measured against the "abuse of discretion" standard. *Id.* Adhering to *Westmoreland*, the D.C. Circuit evaluated the District Court's findings here under the "abuse of discretion" standard.

Other courts have settled upon separate and distinct inquiries into the matters raised by Rule 11 sanctions. For example, the Eighth and Ninth Circuits review disputed factual determinations of the district court under a "clearly erroneous" standard, *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986), and the legal conclusion that the facts constitute a violation are reviewed *de novo*. *Id.* Only the appropriateness of the sanctions imposed is reviewed under an abuse of discretion standard. *Id.; accord Kurkowski v. Volcker*, 819 F.2d 201, 203 n.8 (8th Cir. 1987).

While Cooter & Gell contends that it should have prevailed under either scheme of review, it is respectfully submitted that in these circumstances review of disputed factual determinations by the "clearly erroneous" standard, and *de novo* review of the application of the law to the district court's determinations of facts, would be well suited to evaluating a district court's decision that the sanctioned party's conduct failed to con-

stitute a reasonable prefiling inquiry. This is consistent with the D.C. Circuit's review of ordinary judgments entered in the District Court. *See, e.g., Cuddy v. Carmen*, 762 F.2d 119, 123 (D.C. Cir.), *cert. denied*, 474 U.S. 1034 (1985), *reh'g denied*, 475 U.S. 1072 (1986) (factual questions reviewed according to the clearly erroneous standard, but selection and application of legal standards to the facts are reviewed *de novo*).

The Court of Appeals in this matter was as well positioned to judge the conduct of the parties as was the District Court. There was little "flavor" to the litigation in that barely five months elapsed from filing the complaint to its dismissal; there was never any live testimony; and all of the evidence submitted on the Rule 11 motion was written. Indeed, the questions presented here —apart from the amount and division of sanctions between attorney and client—are analogous to the appeal of the granting of a motion for summary judgment. As such, *de novo* review of the District Court's finding of a Rule 11 violation was entirely supportable. *Int'l. Union v. National Right To Work Legal Defense Foundation, Inc.*, 781 F.2d 928, 933 (D.C. Cir. 1986).

In sum, fairness to litigants and their counsel, who are entitled to "reasonable certainty and predictability," implicates a more particularized review of the factual and legal determinations comprising a Rule 11 decision than is accorded by the abuse of discretion standard. The consequences of a violation are simply too severe, and to achieve the desired levels of uniformity and judicial restraint requires a higher level of scrutiny.

IV. There Is A Split Of Authority Over The Automatic Imposition of Rule 11 Sanctions For An Appeal

The Court of Appeals found that the District Court's award under Rule 11 should also include appellate expenses incurred in defense of that award. *Danik, Inc.*, 875 F.2d at 897-98; *accord Hays v. Sony Corp. of America*, 847 F.2d 412, 419 (7th Cir. 1988).

In conflict with the D.C. and Seventh Circuits, the Ninth Circuit has flatly rejected the contention that Rule 11 has been incorporated into the Federal Rules of Appellate Procedure. In *Orange Production Credit Assoc. v. Frontline Ventures, Ltd.*, 801 F.2d 1581, 1582 (9th Cir. 1986) (*Frontline*), a party which successfully defended the trial court's Rule 11 award sought its appellate fees as well. The Ninth Circuit stated:

> [E]very appellee who succeeded in preserving a favorable trial court award in a Rule 11 case would be entitled to fees on appeal regardless of the substance of the appeal. . . . *We do not perceive this to be the law.*

Id. (citations omitted) (emphasis supplied). Rather, the court held, attorney's fees on appeal can only be awarded *if the appellant is sanctionable under F. R. App. P. 38 in that the appeal is frivolous. Id.* at 1583.

The *Frontline* court distinguished *Westmoreland* as being limited to the situation where the appeal itself is *required* in order to reverse the district court's *denial* of a Rule 11 award. *Id.* at 1583 n.1. Similarly, in *Basch v. Westinghouse Electric Corp.*, 777 F.2d 165, 175 (4th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986), the Fourth Circuit held that appellate attorney's fees incurred for successful defense of an award under Rules 11 and 37 are not recoverable where the appeal was neither frivolous nor interposed for purposes of harassment or delay. *See also Eastway Construction Corp. v. City of New York*, 637 F.Supp. 558, 576 (E.D.N.Y. 1986), *modified and remanded on other grounds*, 821 F.2d 121, 124 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 269 (1987) (in the case of Rule 11, an award of attorney's fees for the costs of defending an appeal can be made only if the appeal was *frivolous*). Here, there was no finding by the Court of Appeals that Cooter & Gell's appeal was frivolous or for purposes of harassment or delay. Thus, award of further sanctions because

of the appeal was inappropriate. In any event, however, this issue requires Supreme Court review, as the Courts of Appeals have reached disparate conclusions regarding the propriety of "appellate" Rule 11 sanctions as an automatic addition to the trial court's imposition of sanctions.

CONCLUSION

For the foregoing reasons, Cooter & Gell respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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August 16, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 23, 1989 Decided May 19, 1989

No. 88-7089

DANIK, INC., D.C. Corporation, on behalf of self and others similarly situated

COOTER & GELL,

Appellant

v.

HARTMARX CORPORATION, a Delaware corporation, et al.

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 83-03568)

Dale A. Cooter, with whom *Joseph M. Cahill* was on the brief, for appellant.

Mark W. Ryan, with whom *Richard J. Favretto* was on the brief, for appellees. *Kenneth S. Geller* and *Douglas K. Mayer* also entered appearances for appellees.

Before: STARR, WILLIAMS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: This appeal arises from an antitrust action that appellants Cooter & Gell, a

law firm, brought on behalf of their client, Danik, Inc., a Washington, D.C. discount clothing retailer. The defandants in that action are appellees here: Hartmarx Corp. and its subsidiaries, Hickey-Freeman Co. (HF) and Hart, Schaffner & Marx (HSM)—collectively, the Hartmarx Group—manufacturers and distributors of men's clothing. After appellants voluntarily dismissed their case, the district court found that both attorney and client had violated Fed. R. Civ. P. 11 by failing to make a reasonable inquiry, prior to the filing of their complaint, into the facts alleged therein. The court awarded sanctions of $21,402.52 against Cooter & Gell and $10,701.26 against Danik.

Danik, which is now bankrupt, has not filed a brief in this court; by separate order, we dismiss its appeal for failure to prosecute. With respect to Cooter & Gell, we affirm the judgment in all respects and remand to the district court for it to award appellees the expenses they incurred on appeal.

I. Background

Litigation between Danik and Hartmarx goes back to June 1983, when Intercontinental Apparel, Inc., another Hartmarx subsidiary, filed a breach of contract action in the district court, claiming that Danik had failed to pay for approximately $100,000 of Intercontinental merchandise. Danik, represented by Cooter & Gell, counterclaimed, alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act. In March 1984, the district court granted summary judgment in favor of Intercontinental on the contract claim, and we affirmed. In February 1985, a jury found for Intercontinental on the antitrust counterclaim, and once again, we affirmed.

Meanwhile, in November 1983, while the above-described litigation was going forward, Cooter & Gell prepared two additional antitrust complaints—both class

actions—against appellees and others. Dale Cooter, Esq., of Cooter & Gell, "presented counsel [for Intercontinental] with draft copies of those complaints and outlined a settlement offer which encompassed the collection suit and the two class actions." Cooter Affidavit at ¶ 7. After Intercontinental rejected the settlement offer, Danik filed the two class action complaints.

The first complaint, on behalf of all men's retail clothing merchants in seven metropolitan areas, charged Hartmarx and three of its subsidiaries with price discrimination in violation of the Robinson-Patman Act. The district court stayed that action, pending resolution of the price discrimination counterclaim in the original Intercontinental contract action. In July 1986, Danik voluntarily dismissed this class action.

Danik's second class action complaint, which forms the background of the present dispute, was filed on behalf of "all men's retail clothing merchants in the United States other than . . . [Hartmarx's allegedly] exclusive agents . . . ." Danik claimed that the Hartmarx Group had established "an exclusive retailer agent policy" whereby Hartmarx sold men's suits made by HF and HSM to only one retailer in each major metropolitan area of the country, either upon the condition or by agreement that the retailer would sell at Hartmarx's "suggested retail price or at an artificially high price." According to the complaint, appellees thereby unlawfully fixed resale prices, allocated retail markets, and refused to deal with the plaintiff, in violation of the Sherman and Clayton Antitrust Acts.

Hartmarx filed a motion to dismiss this second suit, supported by affidavits in which HF and HSM executives denied the existence of any "exclusive retailer agent policy" and showed that, although each brand was distributed by only one retailer in Washington and one in Baltimore, it was in fact the defendant's general practice to sell to more than one retailer in each major metro-

politan area. Indeed, these executives reported that each brand was sold to as many as 20 different retailers in some markets. Hartmarx also moved for sanctions under Rule 11, which, in relevant part, states that:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading . . .; that to the best of his knowledge, information, and belief formed after *reasonable inquiry* it is *well grounded in fact* and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the expenses reasonably *incurred because of the filing* of the pleading, motion, or other paper including a reasonable attorney's fee.

(Emphasis added).

In response to the Rule 11 motion, Cooter & Gell submitted two affidavits describing their pre-filing investigation into the facts they had alleged. Joseph Cahill, Esq. stated that he "asked Faye Reid, a secretary at this firm, to telephone the better known clothing retailers in the Washington, D.C. area to inquire of them whether they sold [HSM] suits, and if not, whether they knew who did." Ms. Reid's affidavit, in turn, confirms that she spoke with "salespeople" at eight such retailers and with people in unspecified positions at two others. Based upon these conversations, Cahill concluded that "not one retailer besides Raleigh's appeared to sell [HSM] suits in the Washington, D.C. area." After he had made several calls to menswear stores in Baltimore, with like results, Reid conducted a similar inquiry of Philadelphia and New York retailers. On this bases, Cahill concluded

that only one retailer in each of these areas sold HSM suits. In the course of their pre-filing investigation, Cooter & Gell at no time asked anyone at Hartmarx about its distribution practices generally or for the names of the retailers that sold its suits in any metropolitan area.

In April 1984, while the defendants' motions to dismiss and for sanctions were pending before the district court, Danik dismissed the antitrust action voluntarily pursuant to Fed. R. Civ. P. 41(a)(1)(i). In June, counsel argued the Rule 11 motion. Cooter stated that the impetus for the complaint had come from the president of Danik, who told Cooter that Danik had been unable to purchase HF and HSM suits, that only one retailer in the Washington, D.C. area carried those brands, and "that it was his understanding that that was a nation-wide practice" on the part of Hartmarx. The district court then took the Rule 11 motion under advisement.

More than three and one-half years later, in February 1988, the district court granted the motion, identifying several fundamental deficiencies in Cooter & Gell's pre-filing inquiry. First, counsel's inquiry concentrated solely on HSM "and thus in no way justified the claim of exclusive retail agency arrangements for [HF] apparel." Second, counsel limited their pre-filing investigation to "four eastern cities" and, consequently, had "no support for the allegation that exclusive arrangements existed in *every major metropolitan area.*" (Emphasis in original.)

Third, the court concluded that "counsel's random telephone investigation is far removed from the type of systematic inquiry needed to conclude that allegations of the severity alleged by plaintiff are 'well grounded in fact.'" Specifically, the court observed that "counsel contacted only a few retailers in cities where dozens of retailers were in business [and] sought the opinion of salesmen instead of management personnel who might have personal knowledge of the alleged exclusive retail agency policy." Finally, the court noted that "exclusive retail agency policies, by themselves, are not per se vio-

lative of antitrust laws." To prevail under the Rule of Reason, a plaintiff must, in adition, "plead, and show, anticompetitive effects . . ., such as price-fixing or retail price maintenance in order to prevail." Counsel's investigation had neither sought nor revealed anything of that sort.

The court then turned to the calculation of costs and attorney's fees and concluded that the $61,917.99 requested by Hartmarx was "excessive." The court found that defendants' counsel had devoted substantial time to research "not reasonably necessary to achieve dismissal of the case." The court concluded that an award of $32,103.78 would serve as an appropriate Rule 11 sanction, two-thirds to be paid by Cooter & Gell and one-third by Danik, which had "authorized the prosecution of this lawsuit albeit on the advice of counsel. . . ."

II. JURISDICTION

Appellants argue initially that their client's voluntary dismissal of the class action that gave rise to the Rule 11 motion divested the district court of jurisdiction to resolve that motion. As the question is one of first impression in this circuit, appellants rely on *Johnson Chemical Co., Inc. v. Home Care Products*, 823 F.2d 28 (2d Cir. 1987). There, a district court had vacated plaintiff's voluntary dismissal and, thereafter, imposed Rule 11 sanctions. On appeal, the Second Circuit held that the district court could not then impose sanctions because "[o]nce [the plaintiff] had dismissed the action under Rule 41(a)(1)(i), the court lost all jurisdiction over the action." *Id.* at 31.

Like the other circuits that have confronted this issue, we think a more particularized analysis is in order. *See Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600 (1st Cir. 1988); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987). *See also Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987)

(court retains jurisdiction (1) because defendant's motion to dismiss, filed before plaintiff's voluntary dismissal, renders inapplicable the self-executing dismissal provisions of Rule 41(a)(1)(i), and (2) due to court's "inherent authority over the cases and parties before it"); *Greenberg v. Sala*, 822 F.2d 882 (9th Cir. 1987) (affirming Rule 11 sanction after voluntary dismissal without attention to jurisdictional issue). As the Seventh Circuit has observed in this very context, "[a] court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business." *Szabo*, 823 F.2d at 1077. For example, a court "that loses its power to decide the merits—perhaps because it has decided them once already [in entering a final judgment]—does not lose power to award attorney's fees that may be in order as a result of what happened before the final decision." *Id.* Further:

> An award of fees under Rule 11 is more like a sanction for [criminal] contempt of court than like a disposition on the merits or even an award of costs. An award under Rule 11 is a "sanction" for violating a rule of court. The obligation to answer for one's act accompanies the act; a lawyer cannot absolve himself of responsibility by dismissing his client's suit.

Id. at 1079.

Appellants offer three arguments against this reasoning. First, they point to the text of Rules 11 and 41, which "simply admit to no exception to the 'bright line' of the plaintiff's unfettered power to dismiss voluntarily and with finality pursuant to Rule 41(a)(1)(i)." In our view, however the wording of the two rules is not dispositive of the relationship between them. For the reasons elaborated below, we believe that the policies behind Rule 11 do not permit a party to escape its sanction by merely dismissing an unfounded case. The bene-

fits to such a dismissal would accure to precisely those plaintiffs for which Rule 11 intends "punishment and deterrence," *Westmoreland v. CBS, Inc.*, 770 F. 2d 1168, 1180 (D.C.Cir. 1985), while the costs Rule 11 is designed to shift would remain with the defendant upon whom the plaintiff unfairly thrust them. Absent a contrary indication in the purposes of Rule 41, we are loathe to read Rule 11 so manifestly against its grain.

Appellants respond that we need not concern ourselves with such abuses of Rule 41, since the defendant can always "bar a Rule 41 dismissal by the simple expedient of filing either an answer or a motion for summary judgment." Under Rule 11, however, the defendant may stand on its motion to dismiss coupled with a motion for sanctions—as Hartmarx has done—and need not incur the burden of further pleadings. It is no answer to say that the defendant may preserve its Rule 11 motion only by incurring further unnecessary costs.

Second, appellant contends that affirmance here will undermine the Rule 11 interest in judicial efficiency by encouraging litigation "over many other newly-asserted exceptions to the bar of a Rule 41 . . . dismissal." Appellants do not identify any such possible exceptions, however, and we can foresee none. Moreover, appellants ignore the deterrent effect that survival of a Rule 11 motion has on the number of sanctionable complaints—and the contrary effect that non-survival would have. If a party could immunize itself from a meritorious Rule 11 motion by voluntarily dismissing its case, the risks associated with the filing of an inadequately investigated complaint would be significantly diminished; and as the price of such misconduct fell, of course, its frequency would rise. In terms of appellants' efficiency argument, therefore, the relevant inquiry would compare the cost of the litigation that appellants predict will occur against the benefits realized by preventing so facile a circumvention of Rule 11 sanctions. In any event, we do not share appellants' fear that, after a Rule 41 dismissal, the survival *vel non* of a host or other matters will be litigated because of the outcome here. Therefore, we conclude that the gains from preserving the deterrent power of Rule 11 outweighs the offsetting costs, if any, of litigation concerning the survival of other, unspecified types of matters.

Third, appellants strive mightily to ward off the power of the analogy between Rule 11 sanctions and criminal contempt suggested by the Seventh Circuit, *see* p. 7, *supra*, for not only would a contempt citation survive even a voluntary termination of the case from which it arose, *cf. United States v. United Mine Workers of America*, 330 U.S. 258, 294 (1947) (court may punish criminal contempt notwithstanding mootness of underlying action), but this longstanding "exception" to Rule 41 finality has not spawned the sort of litigation appellants suggest will inevitably follow in the wake of our holding that a Rule 11 motion likewise retains its vitality after voluntary dismissal. Thus, appellants go on at length about *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987) (*en banc*), in which the court rejected the analogy in the context of deciding that due process does not require use of the Federal Rules of Criminal Procedure in Rule 11 proceedings. *Id.* at 1558-59. That case did not address, however, the distinct question of whether the analogy between Rule 11 and contempt proceedings tends to support post-dismissal jurisdiction over a pending Rule 11 motion. We think it surely does.

Rule 11 sanctions, like penalties for criminal contempt, are, as we said in *Westmoreland*, *supra*, punitive and deterrent in purpose (though they are also compensatory in effect). They are meant to deter the filing of unfounded pleadings, which is an abuse of the judicial process. As in criminal contempt, the court has an interest in deterring such conduct independent of the burdened

party's interest in recovering its expenses. Accordingly, a court may award Rule 11 sanctions or issue a contempt citation *sua sponte*. The Advisory Committee on Rules put it this way: "The detection and punishment of a violation of the signing requirement . . . is part of the court's responsibility for securing the [legal] system's effective operation." Advisory Committee Note, Fed. R. Civ. P. 11. In relevant respects, therefore, Rule 11 is analogous to criminal contempt; the systemic interest in its proper functioning requires that it be available in appropriate circumstances notwithstanding a private party's effort to cut its losses and run out of court, using Rule 41 as an emergency exit.

Appellant argues, in the alternative, that even if this court would generally hold that a Rule 11 motion survives a Rule 41 dismissal, we should nonetheless find jurisdiction lacking here due to the extraordinary lapse of time between the voluntary dismissal and the imposition of sanctions. We are sympathetic to the concern that a lawyer who has other business before the court may feel something of a chill while the Rule 11 motion pends; the sooner the matter is resolved the better. Indeed, the Advisory Committee specifically "anticipated that in the case of pleadings, the sanctions issue under Rule 11 normally will be determined at the end of the litigation . . . ." *Id.* That is surely the better practice. The Committee also provided, however, that "[t]he time when sanctions are to be imposed rests in the discretion of the trial judge." *Id.* Though an extended delay is much to be lamented, therefore, we do not see that delay alone can divest the district court of jurisdiction properly vested there.

Accordingly, we conclude that the district court had jurisdiction to resolve appellees' Rule 11 motion notwithstanding voluntary dismissal of the underlying action and the subsequent delay in its ruling on the matter.

III. Rule 11 Liability

We find not difficulty in affirming liability under Rule 11 here, as none of appellants' arguments calls into doubt the "two obvious deficiencies" that the district court identified in their pre-filing investigation of the facts: specifically, appellants failed to engage in any inquiry whatsoever concerning the allegations against HF (as distinguished from HSM), and they claimed a nationwide conspiracy between defendants and selected merchants in each metropolitan area after polling merchants in only four eastern cities. Appellants' account of their efforts does no more than confirm these shortcomings; they make no attempt to justify them beyond first making the obvious point that it would have been bootless "to ask retailers if they were conspiring with Hartmarx to violate the antitrust laws" and then asserting that they pursued their prefiling inquiry "to the point where it was no longer cost effective to continue." It is impossible to see how "no inquiry" could be a "reasonable inquiry" with regard to the HF allegation or how, without more, an inquiry into four proximate markets could sustain an inference regarding practices elsewhere.

Appellants understandably, therefore, focus upon the district court's observation that "[i]n addition, counsel's random telephone investigation is far removed from the type of systematic inquiry needed to conclude that allegations of the severity alleged by plaintiff are 'well grounded in fact.'" According to appellants, the court's reference to a "systematic inquiry" erects a more stringent standard than the "reasonable inquiry" specified in Rule 11. Read in context, however, it is obvious that the reference to a "systematic inquiry" merely reflects the court's conclusion that, by contacting "salesmen instead of management personnel," and then at only a handful of stores out of dozens in each city, Cooter & Gell had not made an inquiry reasonably commensurate with the extent of their allegations.

Appellants further contend that their investigation of exclusive dealing was reasonable because Hartmarx had the greater access to the terms of its resale agreements and to the identities of its retailers. We agree to the point that disparate access to the information necessary for a putative plaintiff to determine the viability of its prospective cause of action is relevant to the inquiry called for in Rule 11. It simply does not follow, however, that a plaintiff can be excused altogether from the need to make a "reasonable inquiry" into the facts it alleges; rather, the disparate access point goes to the question of what is reasonable given the nature of the information to be obtained. For example, a reasonable inquiry into whether a defendant's activities affect interstate commerce would yield something closer to a certainty than would a reasonable inquiry into whether a defendant harbored an unulawful motive when discharging the plaintiff.

Here, appellant not only limited its investigation to a sampling of salesmen in four eastern cities, it did not even try to ascertain from Hartmarx whether it sold its suits through multiple retailers in major markets. If Hartmarx had refused to answer such a straightforward question, which would not seem to threaten any trade secret, then perhaps it would have been reasonable for appellants to infer that something was amiss. Normally, after all, one would expect a manufacturer to be pleased to say where its product can be bought; indeed, counsel for Hartmarx represented at oral argument that the company had in place an "800" telephone number in order to assist prospective customers in precisely this regard.

The district court also found that appellants were required but failed to adduce factual support for their claim that the "exclusive retail agent policy" they alleged had any anticompetitive effects, such as to run afoul of the Rule of Reason in antitrust. *See Continental T.V. v.*

GTE Sylvania, 433 U.S. 36 (1977). Examination of this rationale would require us to speculate on the extent to which any plaintiff could reasonably be expected to ascertain such information before it invokes the coercive powers of discovery. Since the district court applied the correct legal standard and offered substantial justification for its finding of a Rule 11 violation in other respects that go to the heart of the complaint, it is unnecessary for us to go further.

IV. Amount of the Sanction

Appellants contend that the district court abused its discretion by awarding defendants more than half of a legal fee that the court itself found "excessive." Indeed, the district court found that defense counsel had overstaffed the case and that "the results of much of [the] research [conducted by defense counsel] were not reasonably necessary to achieve dismissal of the case. . . ." The district court was not obliged to and did not detail how it arrived at the decision to allow over half of defendants' legal fees, but presumably based its decision upon an approximation of the amount of necessary work performed by defense counsel.

In reviewing a district court decision to award all or some lesser amount of the attorney's fees of a party prevailing on a Rule 11 motion in the face of a challenge that the award is excessive, we remain mindful that the district court, in such circumstances, exercises a virtually untrammelled discretion. *See Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 691 n.6 (D.C. Cir. 1987) ("even if the award [which was reduced to $42,085 from the $71,202 requested] overcompensates plaintiff for unnecessary expenses caused by defendant, it could still have been justified for punitive and deterrent purposes"). Indeed, we can identify no instance in which this court has ordered any change in the amount of such a sanction. When the district court, without explanation, awards as

a sanction an amount no greater than the costs and attorney's fees incurred by the party moving under Rule 11 and the award is challenged as excessive, only the very rarest case could justify our finding its decision an abuse of discretion.

V. Costs on Appeal

Hartmarx asks us to require appellants to pay the expenses, including attorney's fees, it has incurred in defending its award on appeal. Appellants respond by arguing that "Rule 11 simply does not reach beyond proceedings in the trial court" and that, accordingly, this court may award appellate expenses only if the appeal is "frivolous" under Fed. R. App. P. 38.

Although our decision in *Westmoreland*, 770 F.2d at 1179, involved an award of appellate expenses to one who successfully *challenged a denial* of Rule 11 sanctions by the district court, the reasoning we used to reach that conclusion dictates the outcome in the case at hand, where Hartmarx *defends the grant* of a Rule 11 award. In *Westmoreland*, we looked initially, by analogy, to *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984), in which the Seventh Circuit noted that requiring a party to bear appellate expenses in defense of an award under Fed. R. Civ. P. 37 (abuse of discovery) "could greatly offset the amount of the sanction and thus create a disincentive for seeking sanctions." 770 F.2d at 1179. Based on the premise that the policies behind Rule 11, like those underlying Rule 37, support recovery of appellate costs by a party defending an award thereunder, we then reasoned that the same logic supports recovery of appellate costs in the reverse situation, involving a successful challenge to denial of Rule 11 sanctions. As we noted in *Westmoreland*: "It is very possible that appellate expenses might exceed substantially the sanction in the district court, thus forcing many litigants in appellant's position to conclude that the vindication of the Rule 11 interests is not worth the candle." *Id.*

Closely parsing the language of Rule 11, we ultimately concluded, that an appellant may recover its appellate expenses as they were "incurred because of" the filing for which sanctions should have been imposed by the district court. *Id.* Today, we merely reaffirm *Westmoreland*'s premise that Rule 11 authorizes an appellee to recover the costs it incurs in a successful defense of a Rule 11 award. The First Circuit has adopted the same approach, for the same reasons. *See Muthig*, 838 F.2d at 607.

To resist the force of *Westmoreland*, appellants point to *McLaughlin v. Bradlee*, 803 F.2d 1197, 1206 (D.C. Cir. 1986), in which we affirmed a Rule 11 sanction but nonetheless declined to award appellees the expenses they incurred in defending the matter on appeal. It appears, however, that appellees in that case did not argue that Rule 11 authorized or required such an award but, instead, merely called upon this court to exercise its own authority to sanction "frivolous" appeals under Fed. R. App. P. 38. *Accord Basch v. Westinghouse Electric Corp.*, 777 F.2d 165, 175 (4th Cir. 1985) (appellate defense of Rule 11 and Rule 37 sanction not recoverable where appeal "not frivolous nor . . . interposed to harass . . . or to delay implementation of a valid discovery order," but no indication that appellee invoked Rule 11 as basis for recovery of appellate expenses).

Appellants note further that the Ninth Circuit apparently takes a different view than ours concerning the relevant standard for recovery of appellate expenses. In *Orange Production Credit Assoc. v. Frontline Ventures, Ltd.*, 801 F.2d 1581 (9th Cir. 1986), the court rejected appellees' argument "that the policy behind Rule 11 mandates that fees on appeal be awarded whenever a district court's award of Rule 11 sanctions is affirmed." *Id.* at 1582. The Ninth Circuit denied recovery of appellate expenses because "the appeal was not frivolous under Fed. R. App. P. 38." *Id.* at 1583. The court sought to distinguish *Westmoreland* on the ground that the appeal

there was taken in order to obtain an award of fees erroneously denied by the district court. *Id.* at 1583 n.1. The distinction is obscure, however, not only as a matter of logic, but also because the Ninth Circuit itself noted without further comment that *Westmoreland* "referred to policy considerations which favor an award of fees on appeal in order to preserve sanctions awarded by the trial court"—the very situation in which the Ninth Circuit denied recovery.

The Seventh Circuit, in dicta, has spoken to the relationship between Fed. R. Civ. P. 11 and Fed. R. App. P. 38 as well, noting that "just as the *district* court cannot award fees under Rule 38 of the appellate rules, . . . so the court of *appeals* cannot award fees under Rule 11 of the civil rules." *Hays v. Sony Corp. of America*, 847 F.2d 412, 420 (7th Cir. 1988) (emphases in original). *Accord Steffl v. J.I. Case*, 862 F.2d 692, 696-97 n.4 (8th Cir. 1988) (dictum). The civil rules, of course, "govern the procedure in the United States *district* courts. . . ." Fed. R. Civ. P. 1 (emphasis added). Here, however, we do not "award fees under Rule 11"; we merely reaffirm that the district court's award under Rule 11 of expenses "incurred because of" the unfounded filing should include appellate expenses reasonably incurred in defense of that award. As in *Westmoreland*—and as the Seventh Circuit itself has recently done—we remand to the district court to determine such expenses and, ultimately, to enter an appropriate award. *See Westmoreland*, 770 F.2d at 1179 ("calculation of the amount of the appellate attorneys' fee award can best be made by the district court"); *Hamer v. County of Lake*, Nos. 88-1332 & 88-1354, slip op. at 5 (7th Cir. March 13, 1989) ("remand[ing] in order that the district court may make an additional award of attorney's fees to the appellees under Rule 11 for legal services required in successfully defending [a Rule 11 award]").

VI. Conclusion

Having concluded that the district court had jurisdiction to resolve the motion for Rule 11 sanctions, that the court correctly found appellant's pre-filing inquiry to be inadequate, and that the court's determination of the amount of the sanction was within its broad discretion, we affirm the order of the district court in all respects. In addition, appellees are entitled to reasonable appellate expenses, as determined by the district court on remand.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568-OG

DANIK, INC.,
Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,
Defendants.

Counsel:

For Plaintiff:

Dale Cooter, H. Kenneth Kudon, Joseph Cahill, and Nicholas Hantzes, Washington, D.C.

For Defendants:

Richard J. Favretto, Marc Gary, Mark Ryan, and Rhonda Schwartz, Washington, D.C.

MEMORANDUM

[Filed February 26, 1988]

This case is before the Court on defendants' motion for the imposition of sanctions for violation of Rule 11 of the Federal Rules of Civil Procedure. Defendants' contention is that plaintiff and its counsel violated Rule 11 by not making a reasonable inquiry into the facts prior to the filing of the case and by interposing the complaint for an improper purpose.

I. BACKGROUND

This case was one of four cases involving Danik, Inc. that, at one time or another, have been before this Court. Danik is a Washington, D.C. corporation that owns and operates Dash's Designer retail clothing stores. Defendants are the Hartmarx Corporation and Hickey-Freeman Co., Inc. and Hart, Schaffner & Marx, two Hartmarx subsidiaries. All of the defendants engage in the manufacture and distribution of men's apparel.

The complaint in this case was a class action brought by Danik on behalf of "all men's retail clothing merchants in the United States other than those that are exclusive agents of the defendants . . . for the sale of Hart, Schaffner and Marx suits." The complaint asserted that the defendants established "an exclusive retailer agency policy whereby Defendants will only sell Hart, Schaffner & Marx and Hickey-Freeman men's suits to one retailer in each major metropolitan area in the United States" upon the agreement that such suits will be sold "at the Defendants' suggested retail price or at an artificially high price." The defendants and their retailer coconspirators were alleged to have engaged in illegal price-fixing, territorial restrictions, resale price maintenance, and other unfair competition practices in violaiton of Section 1 of the Sherman Act.

On January 27, 1984, defendants moved to dismiss the case for failure to state a claim. On February 2, 1984, defendants moved for Rule 11 sanctions. Danik opposed both motions. On April 30, 1984, before any action was taken on the Rule 12(b)(6) motion, plaintiff voluntarily dismissed the case. The Rule 11 motion was argued in open court on June 15, 1984.

II. DISCUSSION

Rule 11 was amended in 1983 to impose higher standards of conduct upon parties, and their attorneys, who choose to litigate in federal courts. *See* Advisory Com-

mittee Notes to 1983 Amendment to Rule 11 ("Advisory Committee Notes"). In pertinent part, the amended Rule provides:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

"Unlike the pre-amendment Rule 11, which required a showing of subjective bad faith, Rule 11 now incorporates, through its language 'formed after reasonable inquiry,' an objective test." *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1177 (D.C. Cir 1985); *see also Hashemi v. Campaigner Publications, Inc.*, 784 F.2d 1581 (11th Cir. 1986); *Zalvidar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986); *Eastway Construction Co. v. City of New York*, 762 F.2d 243 (2d Cir. 1985). If a court finds a violation, "Rule 11 *requires* that sanctions of some sort be imposed." *Westmoreland*, 770 F.2d at 1174-75 (emphasis in original).

A. *Investigation of Factual Allegations of the Complaint*

Defendants first contend that plaintiff and its counsel failed to make a reasonable inquiry before alleging that defendants maintained an exclusive retailer agency policy that limited sales of Hart, Schaffner and Marx and Hickey-Freeman suits to one retailer in each major metropolitan area in the United States. Defendants also assert that no reasonable inquiry was made into the allegations of price-fixing, territorial restrictions, resale price maintenance, or other unfair competition practices.

Defendants have submitted affidavits stating that Hart, Schaffner and Marx suits are distributed to more than one retailer in each of fifteen major metropolitan areas save Washington, D.C. The affidavits also reveal that, except in Washington, D.C. and Baltimore, Maryland, Hickey-Freeman suits are sold to more than one retailer in each of the same fifteen major metropolitan areas.[1] The affidavits deny the existence of any exclusive retail agency policy, price-fixing, or resale price maintenance as to either Hart, Schaffner and Marx or Hickey-Freeman suits.

In addition, defendants cite the testimony of Manoochehr John Dashtara, president of Danik, who signed an affidavit in the complaint which stated that the facts set forth in the complaint were true to the best of his knowledge, information, and belief. In a deposition taken on February 29, 1984, Dashtara stated that he relied wholly upon the representations of counsel and conducted no independent review of the factual allegations of the complaint.

In its opposition, plaintiff states that the investigation of the factual basis for this case had its inception in another case involving Danik. In *Intercontinental Apparel, Inc. v. Danik, Inc.*, No. 83-1579, also assigned to this Court, a Hartmarx subsidiary sued Danik for collection of $108,000 due for sale of menswear. Danik counterclaimed, alleging that Intercontinental had engaged in price discrimination in violation of the Robinson-Patman Act.[2]

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[1] The major metropolitan areas cited in the affidavits are New York City, Los Angeles/Long Beach, Chicago, Philadelphia, Detroit, Boston, Washington, D.C., San Francisco, Houston, Dallas, St. Louis, Nassau/Suffolk, New York, Atlanta, Pittsburgh, and Baltimore.

[2] The Court entered judgment for Intercontinental on its collection claim on March 21, 1984. Danik's counterclaim was tried to a jury, which returned a verdict in favor of Intercontinental on

Plaintiff's counsel states that, during discovery in No. 83-1579, he "became aware of the possible existence of an exclusive retail agent policy" for Hart, Schaffner and Marx and Hickey-Freeman suits because Danik had been unsuccessful in its attempts to purchase those lines of menswear. Investigation then led counsel to conclude, correctly, that these lines of menswear were sold only by one retailer in the Washington, D.C. area.

Accordingly, plaintiff's counsel instituted an investigation to determine whether there were exclusive retailing arrangements in other cities. The investigation consisted of telephone calls to retailers in four east coast cities by members of plaintiff's counsel's firm. A legal secretary placed calls to four retailers in New York City, spoke to salesmen, and was advised that the salesmen knew of only one store in the area that carried the Hart, Schaffner and Marx line of menswear. The secretary also contacted four retailers in Philadelphia, again spoke to salesmen, and was advised that the salesmen knew of only one store carrying the Hart, Schaffner and Marx line in that city. A lawyer in the firm telephoned several retailers in the Baltimore area and, after speaking to salesmen, was advised that they knew of only one retailer carrying Hart, Schaffner and Marx menswear. Additional calls were placed to retailers in the Washington, D.C. area.[3] Insofar as is established by the record, these telephone calls were the extent of plaintiff's investigation of theh factual basis for the complaint.

February 22, 1985. The court of appeals rejected Danik's appeal of that verdict on February 5, 1986. *Intercontinental Apparel, Inc. v. Danik, Inc.*, No. 85-5284 (D.C. Cir. Feb. 5, 1986).

[3] Affidavits submitted by defendants state that Hart, Schaffner and Marx menswear was distributed to three retailers in New York City, seven retailers in Philadelphia, two retailers in Baltimore, and one retailer in Washington, D.C. The affidavits also assert that Hickey-Freeman menswear was distributed to twenty retailers in New York City, three retailers in Philadelphia, one retailer in Baltimore, and one retailer in Washington, D.C.

Determination of whether an objectively reasonable pre-filing inquiry has been made will focus upon the circumstances of the case. *See Westmoreland*, 770 F.2d at 1177; *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. 4, 6 (D.D.C. 1984). Factors to be considered include how much time for investigation was available to the signer of the pleading and whether counsel had to rely upon a client for information as to the facts underlying the pleading. *See* Advisory Committee Notes. The district court's determination is "accorded wide discretion" because the court "has tasted the flavor of the litigation and is in the best position to make these kinds of determinations." *Westmoreland*, 770 F.2d at 1174.

In this case, the conduct of plaintiff and its counsel presents a strong case for imposition of Rule 11 sanctions. Here plaintiff advanced serious allegations that defendants committed sweeping nationwide violations of antitrust laws. An objective review indicates that plaintiff's pre-filing inquiry into the facts underlying these allegations was grossly inadequate.

Plaintiff's case rested primarily upon the allegation that the defendants maintained exclusive retail agency agreements in every major metropolitan area in the United States. The inquiry into the factual basis for this claim consisted solely of plaintiff's own inability to purchase Hart, Schaffner and Marx and Hickey-Freeman clothing and telephone calls to clothing salesmen in a limited, randomly selected number of retail stores in four east coast cities. This investigation has two obvious deficiencies. First, it concentrated solely upon Hart, Schaffner and Marx menswear and thus in no way justified the claim of exclusive retail agency arrangements for Hickey-Freeman apparel. Second, it was limited to four eastern cities and consequently provides no support for the allegation that exclusive arrangements existed in *every* major metropolitan area.

In addition, counsel's random telephone investigation is far removed from the type of systematic inquiry

needed to conclude that allegations of the severity alleged by plaintiff are "well grounded in fact." Plaintiff's counsel contacted only a few retailers in cities where dozens of retailers were in business. Plaintiff sought the opinion of salesmen instead of management personnel who might have personal knowledge of the alleged exclusive retail agency policy. These flaws in plaintiff's investigation make it difficult to find a "reasonable inquiry" with respect to the exclusive retail agency allegations.

Even more telling is the absence of anything in the record to suggest that plaintiff made any investigation into its claims of illegal price-fixing, territorial restraints, or resale price maintenance. This lapse is of great significance because it is well established that exclusive retail agency policies, by themselves, are not per se violative of antitrust laws. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983). Rather, exclusive retailing arrangements are analyzed by the "rule of reason," whereby the trier of fact weighs the circumstances of the case to determine whether the restrictive practice imposes an unreasonable restraint on competiiton. *See Continental T.V., Inc.*, 433 U.S. at 49. Thus, plaintiff was required to plead, and show, anticompetitive effects of the exclusive retail agency policy, such as price-fixing or resale price maintenance, in order to prevail. *See, e.g., Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984) (per curiam); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.), *cert. denied*, 464 U.S. 829 (1983). Thus, insofar as is shown in the record, plaintiff failed to make any investigation whatsoever into the factual basis for allegations that were necessary elements of a successful claim.

The evidence suggests that plaintiff conducted an objectively insufficient investigation into its claim of a

nationwide exclusive retail agency policy and no inquiry at all into other necessary elements of its case. In cases where the inquiry into the factual basis for a complaint has been similarly inadequate, courts have not hesitated to find Rule 11 violations. *See, e.g., City of Yonkers v. Otis Elevator Co.*, 106 F.R.D. 524 (S.D.N.Y. 1985); *Filippini v. Austin*, 106 F.R.D. 425 (C.D. Cal. 1985); *United Food and Commercial Workers v. Armour and Co.*, 106 F.R.D. 345 (N.D. Cal. 1985). *Cf. Wymer v. Lessin*, 109 F.R.D. 114 (D.D.C. 1985); *Weil v. Markowitz*, 108 F.R.D. 113 (D.D.C. 1985). There is nothing to suggest that the paucity of plaintiff's pre-filing inquiry was necessitated by time constraints, and Dashtara's deposition testimony reveals that plaintiff's counsel was not relying on the factual representations of the client. *See* Advisory Committee Notes.

Plaintiff's counsel does offer two circumstances which may be viewed as mitigating the inadequacy of the investigation. First, plaintiff notes the general rule that, "in antitrust cases, where 'the proof is largely in the hands of the alleged coconspirators,' *Poller v. Columbia Broadcasting*, 368 U.S. 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976). Thus, plaintiff argues, plaintiffs in antitrust cases should be held to a less stringent standard under Rule 11 because of the difficulty in discovering relevant facts prior to the filing of a complaint.

There are several responses to this argument. First, courts have noted that, even in complex antitrust cases, plaintiffs may not "rely[] on bare allegations coupled with the hope that something could be developed at trial to support those allegations." *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1496 (D.C. Cir. 1984). Indeed, the Supreme Court has refused to establish a rule "that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to

a full dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1967); *see also Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Antitrust plaintiffs, therefore, are required to establish some factual basis for their claims, notwithstanding the discovery difficulties they may encounter.

Second, the cases cited by plaintiff all address the use of summary procedures to dispose of cases, and all predate the 1983 amendments to Rule 11. The only Rule 11 case cited by plaintiff in this context utilized the subjective test of the pre-1983 rule. *See In Re Mid-Atlantic Toyota Antitrust Litigation*, 525 F. Supp. 1265, 1282-83 (D. Md. 1981). As such, the cases cited by plaintiff have little relevance to the determination of whether a litigant has made a reasonable pre-filing inquiry into the factual basis for his antitrust claims.

Rule 11 obligates litigants and their counsel to examine the factual basis for their allegations and to "stop and think" before filing a pleading. *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. at 6. As one court recently noted:

> Rule 11 is designed to insure that allegations made in a complaint . . . are supported by a sufficient factual predicate *at the time that the claims are asserted.* It is thus no answer to a motion seeking Rule 11 sanctions . . . to suggest that plaintiffs needed discovery to ascertain whether the claim asserted was well founded.

City of Yonkers v. Otis Elevator Co., 106 F.R.D. at 525 (emphasis in original); *see also Weil v. Markowitz*, 108 F.R.D. at 116. There is nothing to indicate that antitrust plaintiffs are exempted from conducting the reasonable pre-filing inquiry mandated by Rule 11.

The second mitigating circumstances cited by plaintiff involves communication between the parties prior to the filing of this case. Plaintiff's counsel contacted de-

fendants' counsel to advise them that Danik was contemplating filing this suit and sent copies of the complaint to defendants' counsel for their consideration. Plaintiff's counsel later discussed the case with defense counsel with the apparent intent of initiating settlement discussions as to the claims in this case and those in No. 83-1579. Defendants' counsel responded that they were not interested in such discussions and that, if plaintiff wanted to pursue its claims, it should file its complaint.

Plaintiff's counsel asserts that at no point during these pre-filing contacts did defendants' counsel expressly deny the factual allegations of the complaint. As such, plaintiff's counsel argues that the lack of a denial inferentially supported plaintiff's belief that its factual allegations were "well grounded in fact."

Research has uncovered no Rule 11 cases which involved similar circumstances. It may be argued that, by giving defendants a pre-filing opportunity to deny the factual allegations in the complaint, plaintiff was engaging in the type of careful investigation that Rule 11 requires. Several factors weigh against this conclusion, however. First, plaintiff's counsel apparently never asked defense counsel about the factual basis for the complaint; rather, plaintiff's sole purpose in forwarding the complaint evidently was to encourage settlement of all disputes between the parties. It, therefore, is difficult to construe defendants' failure to deny the factual allegations as an implicit acknowledgement of their truth. Second, plaintiff's counsel admitted during the oral argument of this motion that defendants had, in substance, previously denied similar allegations of antitrust violations. Indeed, plaintiff's counsel stated that, even had defendants expressly denied the factual allegations, he likely would not have believed them. Third, accepting plaintiff's argument could effectively shift the burden of compliance with Rule 11. In every case in which

advance notice of a lawsuit was provided, the party receiving such notice would be required to make point-by-point denials of the complaint's factual allegations or risk waiving the ability to seek Rule 11 sanctions. Neither the language nor the purpose of the 1983 amendments to Rule 11 supports such a result.

B. *Selection of Sanctions*

Because the Court concludes that Rule 11 has been violated, the imposition of sanctions is required. *See Westmoreland*, 770 F.2d at 1174-75. The selection of an appropriate sanction, however, is left to the discretion of the district court. *Id.* at 1178. Rule 11 provides for an award of expenses "incurred because of the filing of the pleading, motion, or other paper." Thus, courts typically require the party who has violated Rule 11 to compensate the opposing party for his attorneys' fees and costs related to responding to the improper pleading. *See Westmoreland*, 770 F.2d at 1178-79; *Eastway Construction Corp. v. City of New York*, 762 F.2d at 254 n.7; *Hudson v. Moore Business Forms, Inc.*, 609 F. Supp. 467, 484-85 (N.D. Cal. 1985).

The Court has carefully reviewed the detailed statement of attorney's fees and expenses submitted by defendants and concludes that the amount requested is excessive. From the outset of this case, defendants insisted that no foundation existed for plaintiff's allegations. Nevertheless, defendants' counsel launched a full-scale assault on all the legal issues raised by the complaint. Five attorneys and additional paralegals spend countless hours researching a variety of antitrust, class certification, Rule 11, and factual issues; however, the results of much of that research were not reasonably necessary to achieve dismissal of the case. Such a response was unreasonably disproportionate.

Particularly unreasonable were defendants' research efforts regarding class certification. While the issue

might ultimately have been presented for the Court's determination, defendants' insistence that plaintiff had failed to state a claim rendered the certification issue secondary. Legal efforts regarding that issue would have been appropriate only after plaintiff's complaint survived a 12(b)(6) challenge, which it did not.

In addition, the Court finds excessive the staffing of this case by defendants' counsel and the amount of research effort devoted to the Rule 11 issue and motion to dismiss. The repeated travels of one associate from Chicago to Washington seem especially unreasonable. This associate's many hours of research and writing on Rule 11 and the repeated review of his work by at least three other attorneys unjustifiably multiplied the amount of effort required to produce a superior brief on this issue.

For the reasons outlined above, the Court finds that an award of $32,103.78 is appropriate as a sanction for violation of Rule 11.

The sole remaining question is apportionment of the sanction. As plaintiff's counsel noted, plaintiff relied entirely on the advice of its attorneys in prosecuting this case. However, a party is not absolved of responsibility under Rule 11 simply because he is ignorant of the law. Danik authorized the prosecution of this lawsuit albeit on the advice of counsel and must assume some of the burden of sanctions. For this reason, counsel for Danik—the law firm of Cooter & Gell—will be assessed a sanction of $21,402.52 and Danik will be required to pay the remaining amount of $10,701.26. Because counsel for Hartmarx has already been paid its fees, the sanctions shall be paid directly to Hartmarx.

III. CONCLUSION

The Court concludes that, under the objective test used in assessing Rule 11 motions, plaintiff failed to make a "reasonable inquiry" into the factual allegations con-

tained in the complaint. The record establishes that plaintiff made an inadequate investigation of its claim that defendants maintained an exclusive retailer agency policy, and that plaintiff made no investigation into its claims of price-fixing, resale price maintenance, and other anticompetitive practices. While Danik's counsel is primarily responsible for this neglect, Danik authorized this lawsuit and must bear a portion of the sanction.

/s/ Oliver Gasch
OLIVER GASCH
United States District Judge

Date: Feb. 25th 1988

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568-OG

DANIK, INC.,
Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,
Defendants.

ORDER

[Filed February 26, 1988]

Upon consideration of defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11, the oppositions thereto, and the record herein, and for the reasons stated in the accompanying memorandum, it is this 25th day of February, 1988

ORDERED that defendants' motion be, and hereby is, granted; and it is further

ORDERED that the law firm of Cooter & Gell shall forthwith pay to the Hartmarx Corporation Twenty-One Thousand Four Hundred Fifty-Two Dollars and Fifty-Two Cents ($21,452.52) as a sanction for violating Federal Rule of Civil Procedure 11; and it is further

ORDERED that Danik, Incorporated shall forthwith pay to the Hartmarx Corporation Ten Thousand Seven Hundred One Dollars and Twenty-Six Cents ($10,701.26) as a sanction for violating Federal Rule of Civil Procedure 11.

/s/ Oliver Gasch
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3568

DANIK, INC.,
Plaintiff,

v.

HARTMARX CORPORATION, *et al.*,
Defendants.

ORDER

[Filed December 2, 1987]

It appearing to the Court that defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11 is ripe for decision, it is by the Court this 1st day of December, 1987

ORDERED that defendants shall submit to the Court a statement of costs and attorneys' fees incurred in the captioned case on or before December 11, 1987.

/s/ Oliver Gasch
OLIVER GASCH
United States District Judge